Canadian
Advisory Council
on the Status of Women

Conseil
consultatif canadien
sur la situation de la femme

PORNOGRAPHY: AN ANALYSIS OF PROPOSED LEGISLATION (BILL C-54)

A Brief presented to
the Hon. Ray Hnatyshyn
Minister of Justice

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Canadian Advisory Council on the Status of Women

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INTRODUCTION

The Canadian Advisory Council on the Status of Women

1. The Canadian Advisory Council on the Status of Women (the Council) was established in 1973 on the recommendation of the Royal Commission on the Status of Women. The Council has 27 part-time volunteer and 3 full-time paid members appointed by the federal government. Collectively, Council members represent the regional, cultural, ethnic, and linguistic diversity of Canada.

2. The mandate of the Council is to advise the government and inform the public on matters of interest and concern to women. The Council advises the federal government on both the impact on women of existing policies and programs and the development of new measures to improve the status of women in Canada; undertakes and publishes research on issues of interest and concern to women with the view to achieving needed reform; informs the general public on key issues; promotes an awareness of these issues through public and media relations; and contributes to the development of a substantive body of Canadian resource material on women's issues.

Women, the criminal law, and equality

3. Throughout the years, the Council has advised the federal government of the need for policy and legislative change on a wide range of criminal law issues. To some, this advice may appear to contain ambiguous, if not conflicting, attitudes towards the criminal law. For example, the Council has advocated the partial decriminalization of prostitution, yet rejected the diversion of wife battering outside the criminal justice system. Why is the intervention of the criminal law appropriate in some cases, and inappropriate in others?

4. Equality is the theme which has united many of these apparent conflicts for the Council. It is a vision of equality which recognizes that women have been (and continue to be) disadvantaged systematically, collectively, and

systemically. It is a vision of equality informed by context, experience, and aspirations. It is a vision of equality requiring that affirmative steps be taken to tackle the structures of disadvantage and to make equality tangible.

5. Women's claims to equality are seldom, if ever, unopposed; as well, they are frequently misconstrued, whether by intention or otherwise. The ongoing struggle to provide a context for the equality "guarantees" in the Canadian Charter of Rights and Freedoms ("the Charter") provides an illustration. During federal hearings on the Meech Lake Accord, women's groups were told that there was no need to refer to Charter sections 15 and 28 in the Accord documents because equality rights did not share the qualities of other rights (multicultural, aboriginal, linguistic) which had been specifically mentioned in the Accord. One of the reasons offered was that women's equality rights did not involve cultural considerations, or group or collective interests. We are alarmed at this assessment of equality rights for women, and its implications for the development of law and policy, whether constitutional, criminal, or otherwise.

6. The legal guarantees of equality in sections 15 and 28 of the Charter have multiple functions: to provide a substantive basis upon which to challenge and remedy sex discrimination, and to provide a context and standard for the measurement of other rights and freedoms. Collective rights have been defined by the Ontario Court of Appeal as follows:

> Collective or group rights . . . are asserted by individuals or groups of individuals **because of** their membership in the protected group.
>
> . . .
>
> Individual rights are asserted equally by everyone **despite** membership in certain ascertainable groups.[1]
>
> (emphasis added)

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[1] *Reference re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513, at 566.

Arguments for the recognition of women's collective rights have been made in the courts,[2] and may form an important element in the development of a legal approach to Charter-based equality rights which is flexible enough to identify and remedy the systemic and structural nature of gender bias and sex discrimination.

7. This development is relevant to the Council's concerns about equality, and to the Council's understanding of pornography as an equality issue. It is also a relevant factor to be considered in measuring the criminal prohibition of pornography against constitutionally-protected rights of equality, expression, association, and cultural recognition.

8. Pornography affects us **because** we are women. Pornography is the product of a multi-billion dollar industry, singularly devoted to the diversification and expansion of its product, market, and profits. This industry is powerful, aggressive, and, by its very nature, committed to the subordination of women. Its harms are multi-faceted.[3] Canada is constitutionally and internationally committed to eliminate all forms of discrimination against women. Effective legislation dealing with pornography is one small, but necessary step in this direction.

CACSW definition of pornography

9. The Council has defined pornography as:

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[2]Affirmative action must be defined as a collective or group right. For example, in *CN v. Canada (C.H.R.C.), (S.C.C., June 1987)*, women successfully argued that they were deprived of employment opportunities because of, not despite, their sex. Further examples are raised in "Women's Equality Rights and the Meech Lake Accord", a paper by Beverley Baines prepared for the Canadian Advisory Council on the Status of Women, September 1987 (unpublished).

[3]See: "Pornography and Harm", a paper prepared by Susan G. Cole for the Metro Action Committee on Public Violence Against Women, November 1987.

a presentation whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which

- **one or more participants are coerced overtly or implicitly, into participation; or**
- **are injured or abused physically or psychologically; or**
- **in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the presentation;**

and in which such behaviour can be taken to be advocated or endorsed.[4]

10. Why have we chosen to define pornography in this particular way? Equality embraces two complementary principles — freedom from, and freedom to. Equality demands that women be **free from** the disabling message of pornography, so that we can be **free to** pursue social, economic, physical, and psychological well-being. However, it is also true that women are "silenced" in our society in many ways and from many sources. Women must also be **free from** silence, and **free to** name the barriers to equality, to confront violence, and to give expression to our lives, experiences, and aspirations. Our objective is to develop a definition of pornography that empowers rather than imprisons women. For that reason, we identify pornography as that which both portrays and endorses a message of violence, degradation, and subordination.

11. The principle of equality itself involves complex and interrelated elements. It is sometimes posited as distinct from other principles, such as freedom of expression. In fact, it is frequently argued that one must choose between, or at least balance, conflict between anti-pornography legislation and freedom of expression. However one wishes to construct first principles, the current Canadian context is such that legislation dealing with pornography will inevitably be measured against the requirements and structure of the Charter. Criminal legislation will receive particular scrutiny. Assuming pornog-

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[4]CACSW Recommendation F4.1, September 1984. See also footnote 13.

raphy is a form of expression covered under section 2(b) of the Charter,[5] it will still be subject to the reasonable limitation requirement of section 1. The principles for measuring impugned legislation against section 1 were set out in *R. v. Big M Drug Mart Ltd.*[6] and in *R. v. Oakes*[7] as follows:

> A statutory provision which infringes any section of the Charter can only be saved under s. 1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M Drug Mart Ltd.*, at p. 352) and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society. This second aspect ensures that the legislative means are proportional to the legislative ends (*Oakes*, at pp. 139-140). In *Oakes*, at p. 139, the Court referred to three considerations which are typically useful in assessing the proportionality of means to ends. First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as little as possible the right or freedom under consideration. Third, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.[8]

Legislation which fails to define pornography in a way which is sensitive to the interrelationships of equality will likely fail both tests set out in section 1 of the Charter. First, an inadequate framework for defining and dealing with pornography will limit the analytical tools necessary to assess the legislation's objective and importance. Second, improperly or inadequately focussed

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[5]See: Kathleen A. Lahey, "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality" (1984-85), 20 *New England Law Rev.* 649 for an interesting discussion of feminist perspectives on "speech" and "expression" and whether pornography is a form of speech or expression protected by the Charter.

[6][1985] 1 S.C.R. 295.

[7][1986] 1 S.C.R. 103.

[8]*R. v. Morgentaler*, S.C.C., January 28, 1988, unreported, per Dickson, C.J., at 36.

legislation will provide a crude and disproportionate instrument for achieving objectives.

BILL C-54

Principles for evaluation

12. In its study of Bill C-114, the predecessor to Bill C-54, the Council emphasized that any proposed legislation must be grounded in contextually-oriented principles. Three principles for evaluating legislation on pornography were offered:

- **Harm — does the legislation prevent harm to women, children and society at large?**
- **Healthy sexuality — does the legislation allow for an appreciation of healthy adult sexuality?**
- **Equality — does the legislation respect the legal, social and economic equality of women?**[9]

13. The harm to women caused by pornography must be understood in the context of violence against women in society. Pornography provides a framework within which violent, coercive, and exploitative acts against women are encouraged, thus contributing to the social and economic undervaluation of women. In addition, the production of pornography is harmful to its participants, who are largely women and children. Thus, the question: Does Bill C-54 prevent harm to women, children, and society at large?

14. Pornography must be distinguished from expressions of healthy sexuality. The Council does not object to erotic material. The problem with pornography, from the Council's perspective, is its violent and dehumanizing portrayal

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[9]Joan Bercovitch and Ginette Busque, *A Critique of Bill C-114 as Proposed Legislation on Pornography: Principles and Clause-By-Clause Analysis* (Ottawa: Canadian Advisory Council on the Status of Women, September 1986), p. 1.

of women (and children), not its sexual content.[10] It is the link between sex and violence that must be broken; the expression of voluntary sexuality must be appreciated. Thus, the question: Does Bill C-54 respect healthy adult sexuality?

15. Equality will not be achieved in principles; equality will be achieved in actual, everyday events. It is necessary to have formal commitment to equality, and to enforce that commitment. However, it is perhaps even more important that women have positive visions of themselves, their contributions to society, and their sexuality. Pornography reflects the perception that women are inferior and available to service men's sexual needs.[11] The vision of women as objects of sexual consumption is a barrier to self-realization and the social, legal, and economic equality of women. Thus, the question: Does Bill C-54 respect women's equality?

16. The Council had hoped, by combining a statement of principles with a clause-by-clause analysis and recommendations on Bill C-114, that the federal government would better understand the nature of the Council's concerns about pornography and its treatment in both existing and proposed legislation. Although Bill C-114 was not referred to a parliamentary committee for detailed study and public comment, the Council's analysis was well circulated and we were optimistic that new efforts to draft legislation on pornography would more precisely address the issues as we understand them.

17. The drafting of Bill C-54 is clearer and more straightforward than its predecessor, and we are pleased to see some changes. Nonetheless, overall we do not find it to be substantially different from Bill C-114 and cannot support Bill C-54 without amendment.

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[10]Ibid; p. 3.

[11]Canada, *Pornography and Prostitution, Report of the Special Committee on Pornography and Prostitution* (Ottawa: 1985), Vol. 1, p. 24.

Proposed definition of pornography

> "pornography" means
>
> (a) any visual matter that shows
>
> . . . , or
>
> (b) any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in (a)(i) to (v).
>
> —Bill C-54

18. The Council is disappointed with the definition of pornography proposed in Bill C-54. Our difficulties begin with the distinction between visual and other matter set out in sections (a) and (b) of the proposed definition. In the Council's view, there are three central characteristics of pornography:

> **(i) it involves violent or degrading behaviours or inequities; AND**
>
> **(ii) its apparent purpose is to cause sexual gratification to or the sexual stimulation of the viewer, reader or listener; AND**
>
> **(iii) it advocates or endorses this behaviour.**[12]

These characteristics must **all** be present. If a representation is pornographic, it has all these characteristics whether it is visual, written, aural, a combination of some or all, or otherwise.

19. To meet the concerns raised in the preceding paragraph, the Council recommends that the Bill start with a basic definition of pornography as follows:

> **Pornography means the portrayal or description of violent or degrading behaviour, or behaviour resulting in or likely to result in death, inflicted by one person onto another or by that person onto her or himself and depicted or described for the apparent purpose of causing sexual gratification to or stimulation of the viewer, reader or**

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[12]Bercovitch and Busque, p. 13.

> **listener, and in which such behaviour can be taken to be advocated or endorsed.**[13]

20. Most of the enumerated behaviours in the definition of pornography proposed in Bill C-54 are qualified by the phrase "in a sexual context" or "for a sexual purpose". The proposed definition of erotica adds a third variation: "for the purpose of the sexual stimulation of the viewer". There are a number of problems with this approach. "Sexual conduct . . . in a sexual context" is tautologous. Beyond that, traditional legal reasoning mandates these three phrases to have meaning, and to have different, if related meanings. The effect of using three separate terms is unpredictable. It could result in a heightened emphasis on sexuality per se or a failure to understand the pornographic content of representations with no obvious sexual content.

21. There is little jurisprudence to help us predict the treatment these phrases are likely to receive. In a discussion of the "sexual context" of sexual assault, McIntyre, J. commented as follows:

> The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observor" (Taylor, *supra*, per Laycraft, C.J.A., at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant . . . The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence it may be a factor in determining whether the conduct is sexual.[14]

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[13]Ibid. The definition of pornography proposed by the Council in paragraph 9 of this brief provides a conceptual framework for discussing pornography. The definition provided here is a legal one, intended to interact with sub-definitions and other provisions proposed by the Council.

[14]*R. v. Chase*, S.C.C., October 1987, at pp. 8-9.

Will sexual context mean carnal context? "Carnal knowledge" is often understood as involving actual intercourse, i.e., penetration.[15] Will threats, simulations, sexual gratification, etc., be treated as factors which may, or may not, contribute to the characterization of the matter as pornographic?[16]

22. Whatever their intended meaning, we believe it better to use one phrase, rather than three. These phrases make sense when their object is to add a "purpose" element in order to distinguish pornography from other sexually explicit material. We have included a purpose element in our proposed basic definition of pornography (paragraph 19) and would further clarify this element with the following definition:

> **Material is presumed to be depicted or described for the apparent purpose of causing sexual gratification to or stimulation of the viewer, reader or listener when it depicts or describes:**
>
> **(i) oral, anal or vaginal intercourse, or attempted oral, anal or vaginal intercourse; or**
>
> **(ii) masturbation; or**
>
> **(iii) the naked breasts of a female, or the naked genitals, anus or buttocks of a person; or**
>
> **(iv) the breasts of woman, or the buttocks, genitals or anus of a person being touched by the mouth or genitals of another;**

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[15] *Black's Law Dictionary*, 5th Ed. (St. Paul, Minn.: West Publishing Co., 1979) p. 193.

[16] One could go on to ask: Will the test be an objective one? Will it be grounded in the reasonable observor? Feminists are not convinced that the reasonable observor is a woman, or that she resides in the "objective" world. See: Margrit Eichler, *Nonsexist Research Methods: A Practical Guide* (Boston: Allen & Unwin, 1987), pp. 11-14; Jill McCalla Vickers, "Memoirs of an Ontological Exile: The methodological rebellions of feminist research", in Angela Miles and Geraldine Finn (eds.), *Feminism in Canada: From Pressure to Politics* (Montreal: Black Rose Books, 1982); Catherine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987); panel presentations on "The Reasonable Woman: Feminist Jurisprudence and Violence against Women", Third International Interdisciplinary Congress on Women, Dublin, Ireland, July 1987.

or when the material places emphasis on:

(i) the genitals, even if they are not nude; or

(ii) the nude parts of the body even if they are not the genitals;

or when the overall context of the film, publication or other thing in which the material is placed has an apparent purpose of causing sexual gratification to or stimulation of the viewer, reader or listener.[17]

Pornography showing impairment; sexually violent conduct (Proposed definition (a) (ii) and (iii))

(a) any visual matter that shows

. . .

(ii) a person causing, attempting to cause or appearing to cause, in a sexual context, permanent or extended impairment of the body or bodily functions of that person or any other person,

(iii) sexually violent conduct, including sexual assault and any conduct in which physical pain is inflicted or apparently inflicted on a person by that person or any other person in a sexual context, or

. . .

(b) any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in ((ii) and (iii) above).

—Bill C-54

23. The Council agrees that sexually violent behaviour should be defined. Canadian society's unacceptable tolerance for sexually violent behaviours, especially toward women, is illustrated in many disturbing examples. Women remain concerned about judges who consistently refuse to correlate violence

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[17]Bercovitch and Busque, pp. 13-14.

and sexual assault,[18] police treatment of sexual assaults,[19] judges who cannot see past their beards,[20] a federal government which argues that, as employer, it is not responsible for the sexual harassment of its employees by their supervisors,[21] and battered women's shelters and rape crisis centres which are forced to struggle day to day for the funds to help women over the terrors of sexually violent behaviour. We believe that the requirement to show "permanent or extended impairment" in subparagraph (ii) of the Bill's definition of pornography may obstruct the identification of less permanent or extended, but equally harmful behaviour.

24. In addition, subparagraphs (ii) and (iii) may be underinclusive. For example, it is not clear that these definitions cover simulations or fantasy settings. It would be ironic if this Bill resulted in the exclusion of these categories, when the courts have very recently acknowledged that:

> In some cases, a simulated act can be more graphic and explicit than a depiction of the actual physical act. . . . The manner of depiction is all important; not whether the scenes are simulated.[22]

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[18]The preliminary findings of research on sexual assault sentencing undertaken by the Metro Action Committee on Public Violence Against Women (METRAC) reveals judicial comments such as "no violence" where the accused raped his step-daughter three times over a two-month period (Adams, N.W.T.C.A., January 22, 1986), or "the victim suffered no lasting psychological injury" where the accused urinated on the victim, used a plunger on her vaginal area, and prostituted her (Buteau and Neil, Ont. Dist. Ct., July 1986), or that there was "no lasting and permanent damage to the complainant" where the accused overpowered her and then raped her in a secluded area (Ashbee, Ont. S.C., December 1984).

[19]Ann Rauhala, "Woman sues police for negligence in investigation of series of rapes", *Globe and Mail*, January 20, 1988.

[20]*R. v. Chase* (1984), 40 C.R. (3d) 282 (N.B.C.A.), in which the court held that touching a woman's breast did not amount to a sexual assault because breasts, unlike genitalia, are only secondary sex characteristics, much like men's beards. (Reversed on appeal, S.C.C., October 1987).

[21]*Robichaud v. Canada* (Treasury Board), S.C.C., July 1987.

[22]*R. v. Video World*, S.C.C., June 25, 1987; 22 C.C.C. (3d) 331, at 341 (Man. C.A.).

Threats of harm should be covered by the definition, and a statement regarding the irrelevance of the apparent consent and/or enjoyment of the participants should also be included. Because the issue of consent is specifically mentioned in subparagraph (iv) of the proposed definition of pornography, its absence in other subparagraphs may signal an inappropriate relevance to judges.

25. The Council would prefer to incorporate pornography causing physical harm in a definition of violent behaviour. All forms and intensities of physical violence would be covered by the amended section. In the context of the basic definition of pornography proposed by the Council in paragraph 19, the following definition of violent behaviour is recommended:

> **Violent behaviour includes:**
>
> **(a) behaviour resulting in or likely to result in death,**
>
> **(b) assault or aggravated assault, or**
>
> **(c) sexual assault or aggravated sexual assault**
>
> **whether these acts are real, threatened, simulated or in a fantasy setting, and whether or not the participants have or seem to have consented to the activity, and whether or not the participants enjoy or seem to enjoy the activity.**[23]

Pornography showing degrading behaviours (Proposed definitions (a)(iv) and (v))

> (a) any visual matter that shows
>
> . . .
>
> (iv) a degrading act in a sexual context, including an act by which one person treats that person or any other person as an animal or object, engages in an act of bondage, penetrates with an object the vagina or the anus of that person or any other person or defecates, urinates or ejaculates onto another person, whether or not the other person appears to be consenting to any such degrading act, or lactation or menstruation in a sexual context,

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[23] Bercovitch and Busque, p. 16.

(v) bestiality, incest or necrophilia, or

. . .

(b) any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in ((iv) or (v) above).

—Bill C-54

26. The drafting of subparagraph (iv) is slightly tortured, reflecting in part some of the inherent difficulties in the Bill's approach to defining pornography. The Council believes that some of these difficulties would be avoided with a basic definition which sets out the common features of all forms of pornography, supplemented as necessary with sub-definitions. To our basic definition of pornography, we would add the following definition of degrading behaviour:

Degrading behaviour includes

(a) necrophilia;

(b) bestiality;

(c) incest;

(d) a person being urinated or defecated on, or being ejaculated upon or spat upon;

(e) acts of slavery or submission;

(f) penetration of a bodily orifice by an object;

(g) a person being treated as an animal or object;

(h) pregnancy, lactation, or menstruation if these functions are misrepresented, or described as objects of ridicule;

(i) a female person apparently or implicitly forced to exhibit her breasts or any person apparently or implicitly forced to exhibit his or her genitals, anus, or buttocks;

(j) a power imbalance. A power imbalance includes situations in which there is more emphasis on the nudity of one sex than on the nudity of the other or in which there is more emphasis on the breasts or genitals of one sex than on the genitals of the other sex or in which there is shown, described, or implied force or coercion.

For the purpose of this section, behaviour is considered degrading whether or not the participants have or seem to

have consented to the activity and whether or not they enjoy or seem to enjoy the activity.[24]

This amendment would include all of the activities described in subparagraphs (iv) and (v) of the proposed definition of pornography, but adds the element of power imbalance. The issue of power imbalance is not one which has been addressed by the Bill and we believe it is a major omission.

Pornography showing masturbation, ejaculation and intercourse (Proposed definition (a)(vi)

> (a) any visual matter that shows
>
> . . .
>
> (vi) masturbation or ejaculation not referred to in subparagraph (iv), or vaginal, anal or oral intercourse
>
> —Bill C-54

27. Activity described in subparagraph (vi) of the definition proposed in Bill C-54 can be promoted, endorsed, or encouraged. It can be written or aural. But once it is shown, it becomes pornography and is prohibited. There is a certain novelty of logic in this proposition. However, we do not believe that words can resolve the problems with this particular definition. The Council recommends that subparagraph (vi) of the proposed definition of pornography be completely removed. In the absence of any contextualizing features, we can only assume that it is the sexually explicit nature of this conduct that has attracted legislative attention. **The Council does not object to sexually explicit material per se.** As we indicated earlier, the basic contextualizing features of pornography are (i) violent or degrading behaviour, AND (ii) a purpose of sexual gratification or stimulation, AND (iii) advocacy or endorsement. These elements, **taken together**, identify pornography. Pornography so defined should be criminalized because it harms women, it prevents the expression of healthy

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[24]Ibid, p. 17.

sexuality, and it constitutes a barrier to the legal, social, and economic equality of women.

28. Subparagraph (a)(vi) does not meet any of these concerns. In fact, its inclusion in the Bill presents several dangers. First, it misrepresents or misunderstands feminist concerns about pornography. We have reached a stage in obscenity law where some courts have begun to understand feminist arguments about pornography. The decision of the British Columbia Court of Appeal in *R. v. Red Hot Video Ltd.*,[25] Shannon, J.'s decision in *R. v. Wagner*,[26] Co. Ct. J. Borins' decision in *R. v. Doug Rankine Co.*,[27] and others are frequently-cited illustrations of this progress.[28] We could not support proposed legislation which would undercut these promising decisions to pornography. Second, these arguments have already been a central feature in determining whether the current section 159 of the Criminal Code is a reasonable limitation on "competing" Charter rights.

29. Finally, we believe subparagraph (vi) of the proposed definition of pornography targets sexuality, as opposed to pornography, and will undermine our own interests in "speech" and "expression". Our concern here is the freedom of women (and men) to discuss, to debate, to reconstruct, and to celebrate healthy human sexuality. It has been suggested that the availability of defences will alleviate concerns about this particular subparagraph. We disagree. Before we can discuss whether there are particular uses of pornography which are acceptable or necessary in our society, we must be able to identify what it is that makes a product pornographic. Subparagraph (vi) does not contribute to this task. Its inclusion in the proposed definition of pornography not only fails to advance women's equality; it may exacerbate our efforts to do so.

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[25](1985), 45 C.R. (3d) 36.

[26](1985), 43 C.R.(3d) 319.

[27](1983), 36 C.R.(3d) 154.

[28]See, for example: S. Noonan, "Pornography: Preferring the Feminist Approach of the British Columbia Court of Appeal to that of the Fraser Committee" (1985), 45 C.R.(3d) 61; but see also: B. Baines, "Annotation", 45 C.R. (3d)3.

Erotica

> "erotica" means any visual matter a dominant characteristic of which is the depiction, in a sexual context or for the purpose of the sexual stimulation of the viewer, of a human sexual organ, a female breast or the human anal region.
>
> —Bill C-54

30. Erotica is distinguished from pornography in Bill C-54 so that its display can be regulated rather than prohibited. The use of the term "erotica" in the proposed legislation is unfortunate. *A Feminist Dictionary* describes erotica as follows:

> Contains the idea of love, positive choice, and the yearning for a particular person. Unlike pornography's reference to a harlot or prostitute, erotica leaves entirely open the question of gender. (Gloria Steinem, 1983, 222)[29]

We believe the focus here should be the display of "other pornographic material". In this particular context, the Council defines "pornographic material" as material which:

> **(i) has as its apparent purpose the sexual gratification or stimulation of the viewer, reader, or listener, and which**
>
> **(ii) depicts or describes a power imbalance. A power imbalance includes material in which there is more emphasis on the nudity of one sex than on the nudity of the other sex or in which there is more emphasis on the genitals of one sex than on the genitals of the other sex or in which there is shown, implied, or described force or coercion but it does not include any matter or thing which is prohibited by (those subsections which define pornography).**

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[29]Cheris Kramarae and Paula A. Treichler, *A Feminist Dictionary* (Boston: Pandora Press, 1985), pp. 141-142.

31. As stated earlier, pornography is not about explicit sexual conduct. It is not about nudity. It is not about sexual stimulation per se. Pornography is about power, whether in terms of explicit relationships or the subtle interaction between subject and object. Neither the definition of erotica proposed in the Bill, nor the behaviours described in subparagraph (a)(vi) of the definition of pornography, reflect this understanding.[30]

Dealing in pornography (Proposed section 159)

32. Unlike Bill C-114, Bill C-54 creates a single, all-inclusive offence of dealing in pornography. "Dealing" includes importing, making, printing, publishing, broadcasting, distributing, possessing for the purpose of distribution, selling, renting, offering to sell or rent, receiving for sale or rent, possessing for the purpose of sale or rental, or displaying in a way that is visible to the public. The penalties attached to this offence differentiate only on the basis of the type of pornography portrayed. There is no differentiation between offences or penalties based on the offender's place in the chain of production.

33. The Council believes that those who profit from the production, distribution, or retailing of pornography should be penalized by the criminal law. However, two factors should be considered in the creation of these offences: the type of pornography portrayed, and place in the chain of production. Rather than the single offence of dealing in proposed section 159(1), **the Council recommends separate offences for (i) producing and distributing (. . .) pornography, and (ii) selling or renting (. . .) pornography.**

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[30]These comments are separate and apart from any reflections the Council might have on the treatment of the display or sale of "sexually explicit material other than pornography" to minors.

Dealing in pornography showing harm/impairment (Proposed section 159(3))

34. In paragraph 25, we recommended a restructuring of the definition upon which this offence would rest. In that context, we believe that the criminal law should treat offences similarly, whether represented for sexual and commercial purposes as pornography, or captured substantively elsewhere in the Criminal Code. Therefore, **the Council recommends that the offence of producing and distributing (. . .) pornography that portrays or describes behaviour resulting in or likely to result in death or aggravated assault or aggravated sexual assault be subject to a maximum sentence of ten (10) years imprisonment.**

35. In keeping with our earlier comments, **we would recommend a maximum term of five (5) years imprisonment for the offence of retailing, i.e., selling or renting (. . .) this type of pornography. We would also limit this offence to procedure by indictment** to encourage the recognition of the seriousness of this matter.

Dealing in pornography depicting sexually violent conduct, degrading acts, bestiality, necrophilia, incest (Proposed section 159(4))

36. As outlined in paragraph 26, we would restructure the definition upon which this offence rests. In keeping with our earlier comments, **we would reformulate this section to cover the offence of producing, distributing (. . .) pornography that portrays or describes assault, or sexual assault, or degrading behaviour. This would be an indictable offence only, liable to imprisonment for a term not to exceed five (5) years. The offence of retailing this same material would be an indictable offence or punishable on summary conviction with a maximum term of two (2) years imprisonment.**

Dealing in pornography showing masturbation, ejaculation and intercourse (Proposed section 159(5))

37. Please refer to our comments in paragraphs 27 to 29.

Display of pornography

38. In addition to the offences of (i) producing and distributing (. . .) pornography, and (ii) selling and renting (. . .) pornography, **we would create an offence for the display of pornography to the public.** However, rather than tie this offence to each type of pornography portrayed, we suggest there be one offence section.[31] **This would be an indictable offence or punishable on summary conviction with a maximum term of imprisonment of two (2) years.** The choice in procedure would allow for differential treatment depending on the type of pornography displayed.

Defences (Proposed section 159.1)

39. The Council agrees that the Bill should not allow for any defences to the most serious forms of pornography: pornography that portrays or describes behaviour resulting in or likely to result in death, or aggravated assault, or aggravated sexual assault. Defences to charges involving other forms of pornography **as defined by the Council,** other than the defence of artistic merit, should be retained. **We would eliminate "artistic merit" as a defence, and substitute a defence for "works of art".** In our critique of Bill C-114, we commented on the differences in meaning between "artistic merit" and "oeuvre d'art" and indicated that, if it were possible to establish criteria for interpretation, the term "oeuvre d'art" would be preferable. Our concern was, and is primarily, that "artistic merit" could be interpreted to refer to the quality of presentation and materials used, that it will permit the separation of form from content and context. Unfortunately, it appears that the drafters of this Bill have chosen to work from the English rather than the French meaning in the earlier Bill. An early commentator on Bill C-54 was of the opinion that the legislation "suggests meaning is inherent in an image, rather than through

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[31] For elaboration of this approach, see Bercovitch and Busque, pp. 21-22.

a relationship between image, viewer and context".[32] Although she did not use legal language, Ms. Gourlay has captured the nature of our concern with both the proposed definition of pornography and the defence of artistic merit.

Display of Erotica

40. Paragraph 30 describes material which the Council believes to be a more appropriate focus than erotica as defined in this Bill. In response to the Fraser Report,[33] the Council noted that the purpose of a display offence for this type of pornographic material would be to ensure that people do not have to pass pornographic material in order to access other areas of the premises in which non-pornographic material is sold or rented, and that the pornographic material should not be visible at all from areas of the premises in which non-pornographic material is sold or rented. As a result, we would recommend an offence as follows:

> **Everyone who displays pornographic material in such a way that it is visible at all to members of the public who want to buy, rent, or view non-pornographic material in a place to which the public has access by right or by express or implied invitation, and everyone who displays pornographic material in a place to which the public has access by right or by express or by implied invitation in such a way that anyone who wants to buy, rent, or view non-pornographic material must pass by the pornographic material, is guilty of an offence punishable by summary conviction.[34]**

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[32]Sheila Gourlay, co-ordinator of the A.K.A. Gallery, Saskatoon, quoted in Sheila Robertson, Opinion/Commentary, *Saskatoon Star-Phoenix*, May 13, 1987.

[33]Reva Landau, *A Critique of the Strengths and Weaknesses of the Fraser Report as Draft Legislation* (Ottawa: Canadian Advisory Council on the Status of Women, September 1985).

[34]CACSW Recommendation F4.9, December 1985. See paragraph 30 for definition of "pornographic material" in this context.

41. Although our comments have focussed on what we understand to be pornography, it is possible that the objective for the inclusion of subparagraph (a)(vi) of the proposed definition of pornography and the proposed definition of erotica is to regulate sexually explicit material other than pornography. The Council has not advocated such an approach; certainly the Criminal Code seems an inappropriate tool to achieve this objective.[35]

42. Whatever its substantive content, we believe that any attempts to regulate display invite the possibility of jurisdictional confusion between federal, provincial, and municipal authorities. **The Council would support the inclusion of a section which clearly delegated to the provinces the jurisdiction to constitute film review boards and to permit municipal regulation of pornographic material not prohibited by the Criminal Code.**[36]

Child pornography (Proposed definition, dealing, using children in production, possession) (Proposed definition (a)(i) and (b), proposed sections 159(3), 159.2, 159.3)

43. The Council has endorsed recommendations 49-52 of the Committee on Sexual Offences Against Children and Youths (Badgley Committee) regarding all persons under 18 years of age.[37] These recommendations are reflected to some extent in Bill C-54 and we commend the federal government for these efforts. We do, however, wish to suggest some changes. Our general concerns about the definition of pornography remain. Within that context, we are concerned that the definition of child pornography contained in subparagraph (a)(i) does not include the conduct identified by the Badgley Committee as "lewd touching". In principle, the Council supports those aspects of the Bill which deal with child pornography; however, we insist here, as elsewhere, on the need for amendment.

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[35]See footnote 30.

[36]CACSW Recommendation F4.7, December 1985.

[37]CACSW Recommendation F2.5, December 1984.

Forfeiture; Mailing (Proposed sections 160; 164)

44. The amendments to sections 160 and 164 are in large part consequential. It is unclear whether the defences available elsewhere in the Bill will also be available for the purposes of these sections. This should be clarified.

Forfeiture of proceeds of crime (Bill C-61)

45. The federal government has also proposed Bill C-61, *An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act.* Among other things, this Bill will identify what is currently section 159 of the Criminal Code (obscenity, corrupting morals) as an "enterprise crime offence". Under the Bill, it is an offence to "launder" the proceeds of an enterprise crime offence. The Bill also authorizes the search, seizure, and forfeiture of any property, benefit, or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of an enterprise crime offence. The Council has not had an opportunity to thoroughly consider the many, and varied, implications for women of Bill C-61. The Council would, in principle, support measures directed at the profitability of pornography. Nonetheless, there are some substantial questions about how the two Bills interrelate. For example, would the amended section 159 alone be targetted as an enterprise crime offence? If additional sections are to be included, which are they? Why are they included? Bill C-61 has some interesting implications given the structure of the offence of dealing in pornography proposed in Bill C-54. We think it important to have answers to questions such as these and we urge the Committee to carefully review Bill C-61 insofar as it may affect Bill C-54.

Hate Literature

46. The Council supports the proposed amendment of the hate literature sections of the Criminal Code to include sex as a distinguishing factor of an identifiable group. However, the Council also agrees with the Fraser Committee that, without additional changes, this amendment will be largely symbolic.

In addition to the amendment proposed, we recommend that the requirement of a specific intent for the offence set out in section 281.2(2) of the Criminal Code be deleted. We further recommend repeal of the requirement in section 281.2(6) that the Attorney General consent to a prosecution under section 281.2(2). Finally, we recommend that the section be amended to cover graphic representations which promote hatred.

Customs Tariff

47. Amendments to the Customs Tariff Act to correspond with amendments to the Criminal Code are proposed. The Council's ongoing concern is to ensure that Canada Customs has the authority and is equipped to combat the importation of prohibited pornography. For this reason, **the Council has recommended that it be made an offence to import pornography into Canada without having it cleared by a central review board. Material should be certified for clearance and there should be related laws to make it an offence to sell, rent, display, copy, distribute or broadcast imported pornography that has not been certified for clearance.**[38] Ninety-seven per cent (97%) of the pornography in Canada is imported; of that, eighty-five per cent (85%) originates from the United States and twelve per cent (12%) from Europe.[39] As a result, Canada Customs has a strategic role to play in the enforcement of this legislation and must be given the means to do so.

48. Given the relative frequency of arguments by defendants to obscenity charges to the effect that they should be able to rely on Customs clearance as an indication of the acceptability of the imported material, **the Council recommends a clear statement in the law that clearance by Customs does not prohibit charges under the Criminal Code.**

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[38]CACSW Recommendation F4.4, December 1985.

[39]Canada, *Pornography and Prostitution in Canada*, Report of the Special Committee on Pornography and Prostitution (Ottawa: 1985), vol. 1., p. 154.

FREE TRADE AND PORNOGRAPHY

49. As far as we know, pornography was not specifically addressed in the free trade talks between Canada and the United States. The pornography industry is, nonetheless, eager to expand and to take advantage of any opportunities that present themselves. The Council has no interest in the creation of employment opportunities in the pornography industry or the service sector that supports it, whether foreign or domestic. At its December 1987 meeting, the Council adopted the following recommendation in relation to free trade and pornography:

> **WHEREAS 85% of pornography in Canada is imported from the United States;**
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> **WHEREAS the United States has both an absolute and a comparative advantage in the production of pornography, with the result that the U.S. pornography industry would welcome a liberalized trade arrangement with Canada that would permit the expansion of its product into Canada;**
>
> **WHEREAS pornography is a systemic and systematic practice of exploitation and subordination based on sex which differentially harms women and their opportunities for equality in Canadian society, as well as children and their right to protection;**
>
> **WHEREAS Canadian society has attempted to control and deter the pornography industry through tariff and non-tariff barriers such as the criminal law, customs tariffs, film and video review mechanisms, postal regulations, broadcasting and communications licensing procedures and regulations, human rights codes, municipal by-laws, etc.;**
>
> **The Canadian Advisory Council on the Status of Women advises the federal government that, in keeping with its national and international obligations to eliminate discrimination against women, a free trade agreement entered into with the United States must preserve and maintain Canada's right and obligations, present and future, to control and deter pornography, regardless of its origin.**

CONCLUSION

50. We commend the federal government for its efforts in bringing forward Bill C-54. It demonstrates a commitment, in principle, to addressing equality for women. However, we have a number of differences with the proposed legislation and cannot support the Bill without amendment. Whatever its final form, it is evident that the criminalization and regulation of pornography will not be sufficient to eliminate the product and its effects. Positive strategies must be developed to challenge and change the violence and sexism of our society. With Bill C-54, this task has only just begun.